STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs- **Supreme Court No._____**

LAVERE DOUGLAS BRYANT,
Defendant-Appellee.

Wayne County Circuit Court No. 13-009087
Court of Appeals No. 325569

PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL ON DIRECTION OF THE COURT

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STATEMENT OF JURISDICTION

This Court has jurisdiction to grant the People's application for leave to appeal by virtue of MCR 7.301(A)(2). The Court of Appeals' August 23, 2016, decision is clearly erroneous because it misapplied the rule for other acts evidence and misconstrued the identification testimony of the police officers. The Court has directed both parties to file supplemental briefs addressing three issues within 42 days of the Supreme Court's Order dated January 24, 2017.

STATEMENT OF QUESTIONS PRESENTED

I.

Evidence of other acts evidence can be admitted to show motive and identity. In this case the judge allowed evidence of the Defendant's sexual misconduct to show the Defendant's motive for kidnapping the female employee of the Family Dollar instead of killing her at the store like he did the male employee. Where the evidence showed the Defendant's motive, did the trial court abuse its discretion in allowing this testimony?

The People answer, "No."

The Defendant would answer, "Yes."

II.

Harmless error analysis applies to cases where a non-structural evidentiary error has occurred and in order for the defendant to prevail under this standard the defendant must show that the mistake affected the outcome of the case. In this case, the untainted evidence overwhelmingly showed the Defendant's guilt. Therefore, under harmless error analysis, is the Defendant entitled to a new trial?

The People answer, "No."

The Defendant would answer, "Yes."

III.

A witness may point out observations from a surveillance video that are not otherwise obvious to the jury. In this case, police officers pointed out several similarities to the Defendant and the suspect entering the Family Dollar that were not otherwise obvious. Since the testimony did not invade the province of the jury and the jury was repeatedly properly instructed as how to treat the testimony, was there error?

The People answer, "No."

The Defendant would answer, "Yes."

STATEMENT OF FACTS

The Defendant was convicted as charged of two counts of first degree felony murder, armed robbery, unlawful imprisonment, felony firearm, and felon in possession of a firearm. The Defendant was sentenced to life without parole for two counts of felony murder, 37 ½ years to sixty years for armed robbery, 14 years three months to thirty years for unlawful imprisonment, four years nine months to ten years for felon in possession of a firearm, and two years consecutive for felony firearm.[1]

On Monday, July 15, 2013, the Defendant robbed the Family Dollar store in Dearborn, Michigan, killing two employees in the process, Brenna Machus and Joseph Orlando, the two employees who were supposed to close the store that night. On the morning of Tuesday, July 16, 2013, when she arrived for work, the store manager, Erica Collins, noticed that both Brenna Machus's and Joseph Orlando's vehicles were still parked in the parking lot.[2] Ms. Collins observed a cell phone she knew to belong to Joseph Orlando of the floor near the cash registers so she exited the store and called the police.[3] The police discovered Joseph Orlando's body in the store bathroom.[4] He had been shot twice in the head.[5] Brenna Machus's dead body was discovered by a passerby two days later along the Southfield Freeway.[6] She also had been shot in the head.[7] Both victims were shot with the same gun.[8]

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[1] 12/11/2014, 35.
[2] 11/11/2014, 39.
[3] 11/11/2014, 37.
[4] 11/11/2014, 41.
[5] 11/13/2014, 13-14.
[6] 11/13/2014, 21.
[7] 11/13/2014, 115.
[8] 11/18/2014, 139.

The Defendant had been terminated from employment with Family Dollar only two months before the murders.[9] Several store employees had complained about the Defendant sexually harassing them. A surveillance video from the Family Dollar store recorded the night of the murders showed a person that had the same physical characteristics as the Defendant.[10] Several witnesses who knew the Defendant very well (for example Sally Jenkins, Paul Holt, Tannisha Fitzpatrick, Cristel Johnson, Necole Ricks-Coleman, and Dionna Wilson) all identified the Defendant as being the perpetrator shown in the Family Dollar surveillance videotape.[11] The person on the surveillance videotape also wore clothing that was similar to clothing that belonged to the Defendant.[12] In particular, the black jacket worn by the perpetrator was very similar to a black jacket known to belong to the Defendant.[13] Also, a witness testified that the person in the surveillance walked in the same manner as the Defendant.[14]

There were fibers found in the Defendant's vehicle that matched fibers from the female victim's clothing.[15] There was also a fiber from the Defendant's vehicle's carpet found on the female victim's shoe.[16] This important physical evidence was evidentiary proof that the Defendant had transported the female victim in his black Jeep Liberty before dumping her dead body by the side of the Southfield Freeway.

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[9] 11/12/2014, 103.
[10] 11/17/2014, 12.
[11] Sally Jenkins was a particularly compelling witness against the Defendant. Sally Jenkins managed the Dearborn branch of Flagstar Bank. She had known the Defendant for about two years from seeing him come into her bank numerous times. She had been trained to observe people as they enter the bank in case they were to get robbed. When she saw the surveillance video on the local news she was so sure it was the Defendant that she went to the Dearborn Police Station the next day. 11/12/2014, 62-65.
[12] 11/12/2014, 108.
[13] 11/18/2014, 69; 11/17/2014, 12.
[14] 11/12/2014, 96-97.
[15] 11/20/2014, 29-31.
[16] 11/20/2014, 22; 48.

Additionally, the Defendant's DNA was found on a black towel left in a shopping cart at the Family Dollar crime scene.[17] This black towel would have been restocked in the Dearborn Family Dollar store on June 19, 2013, which would have been after the Defendant admitted to visiting that store.[18] The same type of black towel was found on the dead body of Joseph Orlando in the bathroom of the store.[19] The shell casings found at the Family Dollar matched the shell casing found under the body of Brenna Machus.[20] Several witnesses, including the Defendant's fiancé, testified that the Defendant owned a handgun.[21] During the time of the murders on July 15, 2013, the Defendant was seen leaving his apartment in the evening by his fiancée.[22] A blood stain found on the Defendant's vehicle floor mat matched Joseph Orlando's DNA in 12 of 16 locations; Joseph Orlando could not be excluded as a donor to that sample.[23]

The Defendant had previously been employed by the Family Dollar so he would have been familiar with the general layout of the store.[24] Shortly after the murders the Defendant took his car to be fully detailed on July 18, 2013, which would have removed trace evidence from his car.[25] When the Defendant was arrested he had $436 in his pocket in the same small denominations that are kept in the Family Dollar.[26] The prosecution proved through this evidence that the Defendant entered the Family Dollar, shot Joe Orlando in the back of the head,

[17] 11/20/2014, 96.
[18] 11/12/2014, 139.
[19] 11/11/2014, 161.
[20] 11/18/2014, 139.
[21] 11/18/2014, 53.
[22] 11/18/2014, 35-36.
[23] 11/20/2014, 115.
[24] 11/20/2014, 136.
[25] 11/13/2014, 44.
[26] 11/11/2014, 46.

stole money from the cash register, kidnapped Brenna Machus, and then killed her and dumped her body by the Southfield Freeway.

The Defendant was arrested on July 19, 2013.[27] On July 20, 2013, the Defendant agreed to a second police interview. After the interview, the Defendant wrote a letter to his girlfriend and to his infant son. In the letter to his girlfriend, Astrin Chandler, he wrote:

> Dear Astrin,
>
> I love you, Astrin. I know there have been times when you questioned my love for you, but please remember the times when you undoubtedly knew I loved you. Loving you as my wife, you and Amahl (phonetic) are the only real family I ever had, the only family I know. I enjoy being a part of it.
>
> I'm not angry at you, Astrin. There is nothing to forgive you for. Instead, I request your forgiveness. Forgive me for how I, for how I wronged. I am sorry. I didn't want to be in you – or, I did want to be in you and Amahl's life. I didn't, I did want to help you raise our son, but unfortunately, it doesn't appear to be the case. I love Astrin, always will, and will never stop loving you. Please don't let Amahl grow up thinking otherwise. I know you are a good woman, and mother. Please don't change. I love you Astrin.
>
> Signed,
>
> Lavere Douglas Lee Bryant.[28]

The Defendant also wrote a letter to his son. That letter read as follows:

> Dear Mahl:
>
> Son, you are the – you are one of – or, you are one years old at this time, but I'm writing this letter for you to read years to come. I've told you over and over that I love you. I wish I could be there in your life, to guide you, to love you. I want to, desperately, but that hadn't been the case.
>
> I want you to know I love you, loved you with all my heart, and is so proud of you. Listen and obey and respect your mother. She will always have your best interest at heart, as I do, and did.

[27] 11/19/2014, 7.
[28] 11/19/2014, 45-46.

> Please son, don't feel abandoned by me. I didn't leave by choice. Sometimes, Amahl Lavere Bryant, my son, things in life happen that we judge can't explain or understand.
>
> I love you Amahl. I love you, I love you. Never doubt that I ever loved you.
>
> Your father,
> Signed,
> Lavere Douglas Lee Bryant.[29]

The Court of Appeals overturned the Defendant's convictions based on the introduction of MRE 404(b) evidence showing the Defendant's history of sexual misconduct, the introduction of videos contained on the Defendant's cellular telephone, and the introduction of the Defendant's sex offender status.[30] This appeal ensues. Other facts will be referenced as necessary within the brief.

[29] 11/19/2014, 47-48.

[30] *People v Lavere Douglas Bryant*, unpublished Court of Appeals Opinion, No. 325569, August 23, 2016 (attached as Appendix A).

ARGUMENT

I. Evidence of other acts evidence can be admitted to show motive and identity. In this case the judge allowed evidence of the Defendant's prior sexual misconduct as evidence of the Defendant's motive in committing the crime against the female victim at the Family Dollar. The trial court did not abuse its discretion in allowing this relevant evidence.

Standard of Review

The admission of evidence is reviewed for an abuse of discretion.[31] A trial court abuses its discretion when its decision falls outside of the range of reasonable and principled outcomes.[32] The reviewing court must form more than a difference of opinion with the trial court before it finds that the trial court abused its discretion.[33] Indeed, the court must find that the trial court's decision was so palpably and grossly contrary to fact and logic that it evidenced not the exercise of will but perversity of will, not the exercise of judgment but the defiance of it.[34] Under this standard, it is difficult to hold that a court abused its discretion on a close evidentiary question.[35]

Discussion

Under MRE 404(b), other acts evidence is admissible so long as it is offered for a relevant proper purpose, and the evidence satisfies the balancing test set forth in MRE 403. In *People v VanderVliet*,[36] the Michigan Supreme Court set forth a four-part standard to determine the admissibility of prior acts evidence. First, the other acts evidence must be offered for a

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[31] *People v Duncan*, 494 Mich 713 (2013).
[32] *Id.*
[33] *People v Hine*, 467 Mich 242, 250 (2002).
[34] *Id.*
[35] *People v Sabin (After Remand)*, 463 Mich 43, 67 (2000); *People v Ackerman*, 257 Mich App 434, 437–38 (2003).
[36] *People v VanderVliet*, 444 Mich. 52 (1993).

proper purpose; that is, offered under a theory other than mere propensity to commit a crime. Second, the evidence must be relevant under MRE 402 as enforced through MRE 104. Third, under MRE 403, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. And fourth, the Court may, upon request, provide a limiting instruction pursuant to MRE 105.

The Michigan Supreme Court recognized that MRE 404(b) is a rule of inclusion rather than of exclusion. The Court stated:

> There is no policy of general exclusion relating to other acts evidence. There is no rule limiting admissibility to the specific exceptions set forth in Rule 404(b). Nor is there a rule requiring exclusion of other misconduct when the defendant interposes a general denial. Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to establish that he acted in conformity therewith.[37]

The exclusionary approach to the admissibility of MRE 404(b) evidence has been explicitly rejected.[38] In short, relevant other acts evidence is admissible so long as it is not offered *solely* to show the criminal propensity of an individual to establish that he acted in conformity therewith.[39]

A. Evidence of Prior Sexual Harassment Complaints Were Offered for a Proper Purpose.

The Court of Appeals ruled that the trial court erred by allowing the jury to hear testimony about the Defendant's sexual harassment of his coworkers and customers while he was employed by Family Dollar, and by permitting the jury to hear evidence of the Defendant's possession of pornography, and evidence related to his prior conviction and incarceration. The Court of Appeals ruled that all this evidence was inadmissible under MRE 404(b)(1).[40] The

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[37] *People v VanderVliet*, 444 Mich at 65 (footnote omitted).
[38] *People v Engelman*, 434 Mich 204 (1980).
[39] *People v Sabin*, 463 Mich 43 (2000); *People v VanderVliet, supra.*
[40] MRE 404(b)(1) provides:

Court of Appeals did not detail the testimony of the employees of Family Dollar but summarily considered it irrelevant because the Defendant was not charged with a sexual offense.[41] But the Defendant was not charged with a sexual offense only because by the time the female victim's body was found on the side of the highway it was eaten away by insects and maggots.[42] Even though a rape kit was performed, the vaginal and perianal samples had the presence of insect larvae which degraded the sample so that any possible seminal fluid was rendered undetectable.[43] Also the victim's face was completely skeletonized so no sample could be taken from her mouth.[44]

But there was a significant amount of circumstantial evidence indicating that the female victim had been sexually assaulted, and that was the reason that she was transported to another location rather than simply leaving her body in the Family Dollar bathroom with the male employee that was shot in the head. For example, the Defendant's semen was found on the back seat of his vehicle and the victim's clothing was in disarray when her body was found. Brenna Machus's purse with a wallet in it was found to contain $100 in cash left at the store, and Joseph Orlando's dead body was found with $270 cash in his pocket.[45] If this crime was simply meant to be a robbery, surely both employees would have been robbed of their cash and left at the scene

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Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[41] *People v Bryant*, unpublished COA decision no. 325569, p.4 (attached as Appendix A).
[42] 11/13/2014, 116.
[43] 11/18/2014, 168.
[44] 11/13/2014, 131.
[45] 11/11/2014, 169, 179, 201.

instead of one being transported by car away from the store. When the Defendant forced the female victim out of the store the Defendant already had the assistant manager's keys and had already opened the safe to retrieve the money inside.[46] The Defendant even locked the door on his way out.[47] It was the prosecution's theory that there was no other logical reason to take the female victim away from the store after the robbery except for a sexual purpose, especially since the Defendant had previously expressed his special interest in Ms. Machus.[48]

Pursuant to MRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other-acts evidence, however, may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[49] The Court of Appeals decision ruled that it was error for the trial court to admit witness testimony of allegations of the Defendant's prior sexual harassment complaints into evidence. The evidence was admitted to demonstrate the Defendant's motive as to why the Defendant would target the Family Dollar, a job that he was fired from for sexual harassment only two months before the murders, and then would kidnap the female victim, Brenna Machus, the assistant manager, after robbing the Family Dollar, before shooting her and leaving her dead body by the Southfield Freeway.

Although the male victim, Joseph Orlando, was left in the bathroom of the Family Dollar shot twice in the head, the female victim was taken away from the Family Dollar before her death. The prosecution's theory, based on the female victim's clothing being found in disarray

[46] 11/11/2014, 40, 56-57.
[47] 11/11/2014, 106; 11/11/2014, 40.
[48] 11/12/2014, 106; 11/14/2014, 37, 46.
[49] MRE 404(b)(1).

(she was found clutching her work shirt and her undershirt was turned inside out) and her purse being found at the Family Dollar (her credit card and driver's license were found inside of her sock instead of inside her bra where she usually kept them), was that the female victim had been sexually assaulted prior to her being shot in the head and left by the side of the freeway and that the motive for killing her was sexual assault not robbery. Due to the extreme decomposition of her body no DNA evidence of rape could be found, but the Defendant's semen was found in the back seat of his vehicle and carpet fibers from the driver seat head rest of the Defendant's vehicle were found on the victim's black pants and a fiber from floor board of the Defendant's vehicle was found on the victim's shoe.[50] Had the motive simply been just a robbery, the female's body would have been left at the scene just as the male victim was.

The prior acts evidence shows the Defendant's motive in taking Brenna Machus from the Family Dollar was to sexually assault her before killing her and dumping her body along the Southfield Service Drive at Michigan Avenue. Evidence of motive is always relevant in a prosecution for murder.[51] Motive has been defined as "the moving power which impels to action for a definite result."[52] As opposed to intent which has been defined as "the purpose to use a particular means to effect such result. Motive is that which incites or stimulates a person to do an act."[53] The *Hoffman* court held that admitting evidence of defendant's other acts for the purpose of establishing defendant's motive was proper. In *Hoffman*, the court reasoned that evidence of defendant's hatred toward women and his previous acts of hostility toward women

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[50] 11/20/2014, 18; 44; 48.

[51] "In cases in which the proofs are circumstantial, evidence of motive is particularly relevant." *People v Unger*, 278 Mich App 210, 223 (2008), citing *People v Fisher*, 449 Mich 441, 453 (1995).

[52] *People v Hoffman*, 225 Mich App 103, 106 (1997), citing *People v Weiss*, 252 App Div 463 (1937).

[53] *Id*.

established more than character or propensity. The court believed that the other act evidence was "relevant and material to defendant's motive for his unprovoked, cruel, and sexually demeaning attack on his victim."[54] In addition, "proof of motive in a prosecution for murder, although not essential, is always relevant."[55] Relying on the *Hoffman* ruling, the Michigan Supreme Court in *People v Fisher* stated "in a circumstantial murder trial, evidence of motive is highly relevant."[56] The evidence of Defendant's other acts shows that it is likely he took Brenna Machus from the Family Dollar the night of July 15, 2013 for the purpose of sexually assaulting her before he ultimately put a bullet in her brain. The other acts also establish that Brenna Machus was specifically targeted, that this wasn't a random act of violence against two teenagers, but a well planned and executed kidnapping and murder.

The jury heard from eight female witnesses (Alexis Coleman, Amanda Priebe, Dionna Wilson, Alyson Holt, Tannisha Thomas Fitzpatrick, Cristel Johnson, and Jasmin Gregory) who testified that they were sexually harassed by the Defendant while working at the Family Dollar.[57] Before trial the prosecutor had filed the proper notice of intent to introduce evidence of the sexual harassment complaints made against the Defendant by several female employees of the Family Dollar. The trial court ruled that evidence of these sexual harassment complaints was admissible to show motive and identity.[58] The trial court's ruling allowing this evidence to be presented to the jury was not erroneous.

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[54] *Hoffman,* 225 Mich App at 111.
[55] *People v Rice* (on remand), 235 Mich. App. 429, 442 (1999).
[56] *People v Fisher*, 449 Mich 441, 453 (1995).
[57] The seven witnesses that suffered the sexual harassment were Alexis Coleman, Amanda Priebe, Dionna Wilson, Alyson Holt, Tannisha Fitzpatrick, Cristel Johnson, and Jasmin Gregory. 11/17/2014, 32-132.
[58] 08/01/2014, 21.

The motive evidence showed that this was not a random act of violence but that the Defendant specifically targeted Brenna Machus. Several of the witnesses testified that the Defendant treated Brenna Machus differently from the other employees. Ms. Machus used to visit her friend, Sarah Coulter, at the Inkster Family Dollar store on a regular basis where the Defendant was the assistant manager.[59] Sarah Coulter testified that the Defendant would always say that Ms. Machus was pretty, beautiful, and cute.[60] Jasmin Gregory testified that when Brenna Machus would come into the store to speak to Sarah Coulter, the Defendant would ask Brenna to leave whereas he allowed other visitors to stay.[61] Paul Holt, the store manager, testified that Ms. Machus told him that the Defendant made her feel uncomfortable and was bothering her.[62]

In *People v VanderVliet*,[63] the Michigan Supreme Court held that evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403. It also held that MRE 404(b) is consistent with an inclusionary, not exclusionary, theory of admissibility.[64] Under MRE 404(b), other acts evidence is admissible, "unless the proponent's *only* theory of relevance is that the other act shows defendant's inclination to wrongdoing in general to prove that the defendant committed

[59] 11/14/2014, 37.
[60] 11/14/14, 37.
[61] 11/17/2014, 134-136.
[62] 11/12/2014, 106.
[63] *People v VanderVliet*, 444 Mich 52, 74–75 (1993).
[64] *People v VanderVliet, supra* at 64–65; *People v Sabin*, 223 Mich App 530, 533 (1997).

the conduct in question."[65] Stated another way, if the intervening inference between the other act and the ultimate inference for which the evidence is proffered is that the defendant has a propensity to commit the charged crime then the evidence is inadmissible.[66]

In the instant case, the prosecutor introduced evidence that the Defendant had been terminated from the Family Dollar, in part, to establish the Defendant's intent and absence of mistake. Evidence regarding the unpleasantness of his termination served to substantiate the reason why the Defendant targeted the Family Dollar and targeted the female assistant manager, Brenna Machus. The fact that several employees testified to the circumstance of his firing does not make it any less relevant to the corroboration of the evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[67] The prosecution is not limited to a certain number of witnesses to establish a motive to commit a crime.

Establishing motive is among the purposes for which prior-acts evidence is expressly admissible.[68] In *People v Hoffman* evidence of the defendant's cruel and misogynistic treatment of two of his former girlfriends was admitted to show motive as to why he would kidnap and assault his current girlfriend. Similarly, in this case, the evidence of the repeated sexual harassment of several employees of the Family Dollar would be relevant to show the Defendant's motive in singling out the female employee for different treatment than the male employee. Whereas the male employee was left dead in the bathroom, the female employee was

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[65] *VanderVliet, supra* at 63 (emphasis added).
[66] See *Crawford, supra* at 390.
[67] MRE 401.
[68] MRE 404(b), *People v Harris*, 219 Mich App 184, 1861 (1996), *People v Hoffman*, 225 Mich App 103, 105-06 (1997).

kidnapped, and when her body was discovered three days later by Trenton Daniels her clothing was in a disheveled state.[69] That the Defendant had a particular fascination with the sexual qualities of the female employees of the Family Dollar Store would explain the Defendant's motive in kidnapping Brenna Machus and taking off her clothes then shooting her in the head instead of just killing her inside the store as he did the male employee.

Also, the Defendant felt that his termination from employment from Family Dollar was particularly unfair. The Defendant testified that he had not sexually harassed anyone but the reason that he was fired was because Paul Holt was trying to make Cristel Johnson an assistant manager and needed the Defendant's position to be empty to do so and because the Defendant had been sent by the company to investigate theft and in doing so the Defendant had prevented Paul Holt and the employees from stealing merchandise and therefore, Paul Holt had a personal vendetta against him.[70]

In this case premeditation was certainly a material fact at issue in the case. The Court of Appeals opinion ignored the fact that the Defendant was charged with premeditated murder and, therefore, evidence of the Defendant's preparation to commit the murders would be very relevant.[71] Thus evidence of the Defendant's relationship to the Family Dollar store was relevant. Rather than picking any open store and killing any employees who happened to be inside, the Defendant deliberately chose the Family Dollar and chose to kill two employees. His animus towards the Family Dollar because of his recent termination for sexual harassment was relevant to motive. Presenting the Family Dollar employees to explain their interactions with

[69] 11/13/2014, 21.
[70] 11/20/2014, 141.
[71] When a defendant pleads not guilty to the offense charged, all elements that comprise the offense are placed at issue. *People v Martzke*, 251 Mich App 282, 287 (2002).

the Defendant was part and parcel of explaining the Defendant's motivation to seek out the Family Dollar for his crime and the reason that he singled out the female assistant manager to kidnap and then kill. Since there were no direct witnesses left alive to testify as to the Defendant's actions that night, circumstantial evidence had to be relied on.

Moving to the third prong of the *VanderVliet* test, the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. The third prong of the *VanderVliet* test requires the Court to determine, under MRE 403, whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The other acts evidence that the People presented satisfied the balancing test set forth in MRE 403. MRE 403 states that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Thus, under MRE 403, the Court must weigh the probative value of the evidence against the danger of unfair prejudice. But MRE 403 does not call for exclusion of evidence simply because it prejudices the Defendant. Indeed, evidence of guilt is always prejudicial. Unfair prejudice means more than simply damage to the Defendant's case.[72] As the Court in *People v Gore* stated:

> We are quick to dispense with the recurrent notion that evidence should be excluded under MRE 403 because it simply "prejudices" the cause of the objecting party. Obviously, evidence is offered by an advocate for the always clear, if seldom stated, purpose of "prejudicing" the adverse party. Recognizing this, the Supreme Court in adopting MRE 403 identified only unfair prejudice as a factor to be weighed against probative.[73]

[72] *People v Vasher*, 449 Mich 494 (1995).
[73] *People v Gore*, 132 Mich App 693, 702 (1984).

Not only must it be unfairly prejudicial to be excluded, the evidence must substantially outweigh the probative value of relevant evidence.[74] It is substantially unfair prejudicial evidence and not merely prejudicial evidence that is excluded.[75] Thus, only if the danger of *unfair* prejudice *substantially* outweighs its probative value is the Court to exclude the evidence. Here, any potential for unfair prejudice was minimized by the trial court's cautionary instruction advising the jury of the limited, permissible purposes of the evidence, and that the jury could not convict defendant because it thought he was guilty of other bad conduct.[76] Accordingly, the trial court did not abuse its discretion in determining that the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice.

B. Sex Offender Registry List Evidence was Relevant to Credibility.

The Court of Appeals also ruled that evidence of the Defendant's conviction for criminal sexual conduct and subsequent failure to register as a sex offender was reversible error. Michigan State Police Lieutenant Todd Johnson was permitted to testify that he went to Marquette Prison on February 18, 2011, to have the Defendant sign the sex offender registry responsibility form.[77] Lieutenant Johnson testified that he made the Defendant aware of the requirements of the Sexual Offender Registry Act and had him sign the form.[78] The Defendant was arrested pursuant to the outstanding warrant for failure to register when he gave his first statement in this case. The evidence was admitted because it showed that although the Defendant knew that he was supposed to register his home address with the police, he did not do so, and the Defendant told the police during questioning that he was homeless rather than

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[74] *Vasher, supra*.
[75] *Gore, supra*.
[76] See *People v Martzke*, 251 Mich App 282, 295 (2002).
[77] 11/18/2014, 122.
[78] 11/18/2014, 121.

revealing his true address.[79] This shows evidence of his intent to evade detection and evidence of flight.

The Court of Appeals erroneously held that the probative effect of the evidence was substantially outweighed by the prejudicial effect. Evidence of flight is always relevant and it is well established in Michigan law that evidence of flight is admissible.[80] Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight by itself is insufficient to sustain a conviction.[81] The term "flight" has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody.[82] Concealing his address from the authorities was akin to evidence of flight.

When the Defendant was first arrested and questioned for this crime he claimed that he was homeless; however, he clearly lived at the Wessex Court address with his girlfriend, Astrin Chandler, and had lived there for some time.[83] Thus the Defendant's knowledge of the requirements of the sex offender registry act that required the registration of his home address with the police would be relevant to the Defendant's credibility, especially since the Defendant testified that he was at his home on the night of the offense. Therefore, this evidence was properly admitted.

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[79] 11/

[80] See, e.g., *People v Cammarata*, 257 Mich. 60, 66 (1932); *People v Cutchall*, 200 Mich App 396, 398–401 (1993); *People v Clark*, 124 Mich App 410, 413 (1983).

[81] *People v Coleman*, 210 Mich App 1, 4 (1995).

[82] 29 AmJur2d, Evidence, § 532, p 608. *People v Coleman*, 210 Mich App 1, 4 (1995).

[83] The Defendant has several pieces of mail identifying Wessex Court as his address (including pay checks) and he had an apartment insurance policy on that address in his name. 11/20/2014, 174.

C. Pornographic Cell Phone Video was Relevant.

The Court of Appeals erroneously held that the testimony regarding two pornographic videos found on the Defendant's cellular telephone was irrelevant. On the contrary, the first video was titled "Getting Even" and depicted several males entering an establishment, attacking a female employee, stealing money, removing the female employee from the business, taking her to a vehicle, forcing her into the vehicle, forcibly having sex with her, then pulling the vehicle over and letting her out of the car.[84] The second video was titled "Getting Even 2" and it showed several males walking into a business where there is only one female working and one of the males is armed with a shot gun. The males violently attack the female employee, forcibly remove her clothing, and then forcibly have sex with her.[85]

These acts depicted in the cell phone video are very similar to what the evidence proved that the Defendant did to Brenna Machus. The Court of Appeals erroneously focused on the fact that the movies were legal pornography. But the logical relevance was not dependent on the pornography aspect of the films, rather that they were a blueprint of his plans and contained the exact same actions as what the Defendant later perpetrated at the Family Dollar – that is entering a business, attacking a female employee, stealing money, removing the female employee from the business, taking her inside of a vehicle, then later dumping her out of the vehicle. The fact that the Defendant took the time and trouble to save these particular movies to his cellular telephone shows more than just a mere coincidence. It likely inspired him to commit the crime as he did. This cellular telephone had last been used in April of 2013, only three months before the murders. In this technological age, searching for and saving the movies to his cellular

[84] 11/19/2014, 24-25.
[85] 11/19/2014, 25.

telephone is akin to the Defendant writing out a plan to commit the crime. Logical relevance is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot.[86]

Also, there was no objection to the admission of this evidence. Therefore, review should have been for plain error. Under plain error review, there are four steps to determining whether an unpreserved claim of error warrants reversal.[87] First, there must have been an error.[88] Second, the error must be plain, meaning clear or obvious.[89] Third, the error must have affected substantial rights.[90] This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." [91] The Defendant bears the burden of establishing prejudice.[92] Fourth, the error must have "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity, or public reputation of judicial proceedings."[93] Under plain error review, there was nothing about the admittance of the cell phone evidence that would merit the overturning of the convictions.

D. Evidence of Prior Conviction Was Relevant to Felon in Possession Charge.

The Court of Appeals also found objectionable that evidence regarding the Defendant's prior conviction for sexual assault was introduced at trial. The Defendant was charged and convicted of being a felon in possession of a firearm.[94] Therefore, evidence of the Defendant's prior felony conviction would be relevant in proving this charge. There was no stipulation

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86 *People v Sabin*, 463 Mich 43, 64 (2000).
87 *People v Carines*, 460 Mich at 763.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 MCL 750.224f

entered, so the prosecution was free to establish that the Defendant had been convicted of a specified felony. In this case, the Defendant testified that he had previously been convicted of criminal sexual conduct in the second degree in 2011.[95] There was no objection to this testimony and there was no further inquiry into the details of this conviction. Therefore, there is no possibility that this reference to the Defendant's prior conviction was in any way improper. Under these circumstances, the prior conviction, since there were no details entered as to what happened, was not other acts testimony and should not have been considered as such by the Court of Appeals.

[95] 11/20/2014, 169.

II. Harmless error analysis applies to cases where a non-structural evidentiary error has occurred and in order for the defendant to prevail under this standard the defendant must show that the mistake affected the outcome of the case. In this case, the untainted evidence overwhelmingly showed the defendant's guilt. Therefore, under harmless error analysis, the defendant is not entitled to a new trial.

Standard of review

The standard of review on appeal of preserved error that does not involve a constitutional claim is harmless error. The harmless-error rule is primarily embodied in statute, MCL 769.26, with additional statements of the doctrine in court rule MCR 2.613(A) and in evidentiary rule MRE 103. MCL 769.26 provides in pertinent part: "No judgment or verdict shall be ... reversed ... in any criminal case, on the ground of ... the improper admission ... of evidence, ... unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence. Because in this case there was overwhelming evidence of guilt, it does not affirmatively appear that there has been a miscarriage of justice.[96]

Discussion

The Court of Appeals rejected the idea that the MRE 404(b) evidence, even if improperly admitted, could have constituted harmless error without further discussion.[97] Under the harmless error statute, MCL 769.26, where the error is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence.[98] As for some types of error, such as the erroneous admission or exclusion of evidence,

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[96] *People v Straight*, 430 Mich 418 (1988); *People v Mateo*, 453 Mich 203, 206–07 (1996).
[97] *People v Lavere Douglas Bryant*, unpublished COA opinion no. 325569, August 23, 2016 (attached as Appendix A).
[98] *People v Mateo*, 453 Mich 203, 206 (1996).

overwhelming evidence of guilt will ordinarily lead to the conclusion that the error was harmless. It would take evidence of an extraordinary quality to conclude that its erroneous admission or exclusion may have contributed to the verdict where the government had before the jury other evidence that could clearly and positively establish guilt.[99]

In this case, the evidence of the Defendant's guilt was very strong. Fibers from the victim's clothing were found inside the Defendant's vehicle and a stray fiber on Ms. Machus's shoe matched the carpet fiber found in the Defendant's vehicle.[100] Multiple people very familiar with the Defendant identified the Defendant as being shown in the Family Dollar surveillance video taken on the night of the murder.[101] A black towel found in a shopping cart at the store contained the Defendant's DNA.[102] This towel would have been restocked on June 19, 2013, which is after the date the Defendant claimed was the last time he visited the store.[103] When the police arrested the Defendant, he was in possession of $436 which included $56 in one dollar bills and sixteen five dollar bills, which were the same small denominations taken from the store's safe.[104] Shortly after the crime, the Defendant was observed disposing of items in several distant trash dumpsters. He also washed the inside of his vehicle and asked about having the interior of his vehicle professionally detailed even though he had already cleaned it himself. The Defendant stated to police initially that he did not dispose of a Family Dollar bag in a dumpster

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[99] *People v Mateo*, 453 Mich 203, 214 (1996), quoting 3 LaFave & Israel, Criminal Procedure, §26.6(b), p. 269.
[100] 11/20/2014, 51.
[101] Witnesses included Nicole Ricks-Coleman (11/17/2014, 11), Dionna Wilson (11/17/2014, 61-62), Tannisha Thomas-Fitzpatrick (11/17/2014, 92-93), Cristel Johnson (11/17/2014, 107), Jasmin Gregory (11/17/2014, 133), Sally Jenkins (11/12/2014, 96), and Paul Holt (11/12/2014, 107).
[102] 11/20/2014, 96.
[103] 11/12/2014, 139.
[104] 11/11/2014, 46.

but upon being notified that there was surveillance footage of him doing it he said that he did dispose of a Family Dollar bag in a dumpster at the Allen Park Motor Lodge and that he had that bag left over from when he did deposits from the store.[105] Yet all the other employees testified that was not how deposits were done, that there were special deposit bags for that purpose. The Defendant's brother, David Rowe, told the police that the Defendant called him the day after the murders and wanted to sell him a clip to a Smith & Wesson .45 caliber gun, and the bullet casings found at the scene were the brand Smith & Wesson.[106] The Defendant also wrote goodbye letters to his girlfriend and son after being arrested.[107] In the letter to his girlfriend he admits that he did wrong and he was sorry.[108] The Defendant placed luggage near the front door of his apartment on Friday, July 19, 2013.[109] Two of the bags had new clothing neatly folded in them.[110] One bag had bathroom items placed into haphazardly, for example, it had used razors, deodorant without a lid, broken cologne bottles, and bottles without tops.[111] After news of the murders was shown on the local television news, the Defendant lied to his girlfriend and told her that he did not know Brenna Machus, but obviously he did know her.[112] On July 19, 2014, in the early morning, after stopping at a vacant house in Detroit, the Defendant disposed of something in a dumpster at the Allen Park Motor Lodge. In one of the dumpsters outside the Defendant's apartment the police found a plastic shopping bag with a red fabric Family Dollar shopping bag

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[105] 11/19/2014, 96.
[106] 11/18/2014, 136. David Rowe testified at trial that he fabricated this piece of information so that the police would release him. 11/18/2014, 28.
[107] 11/19/2014, 44-48.
[108] Id.
[109] 11/18/2014, 44-46.
[110] 11/14/2014, 8.
[111] 11/14/2014, 8.
[112] 11/18/2014, 52.

with the tags still on it.[113] DNA tests revealed that the Defendant could not be excluded as one of the three DNA donors on the fabric shopping bag.[114] All this evidence taken together overwhelmingly proves the Defendant's guilt.

Reversal of a criminal conviction on the basis of a trial court's erroneous evidentiary ruling is only necessary where the error prejudiced the defendant and resulted in a miscarriage of justice.[115] A defendant seeking reversal "has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error."[116]

Although the evidence in this case was largely circumstantial, that circumstantial evidence was overwhelming. Hence, aside from the sexual misconduct evidence, there was more than ample evidence to convince the jurors of the Defendant's guilt. Moreover, the defense effectively cross-examined the employees and cogently argued that the employees were biased against the Defendant and that Paul Holt had created a rumor mill amongst the Family Dollar employees to discredit the Defendant. In the context of the defense's cross examination and closing argument regarding this issue, any error in admitting the sexual misconduct evidence did not create a miscarriage of justice that would justify reversal under MCL 769.26. The trial court gave a limiting instruction regarding the other acts testimony which explicitly proscribed the jurors from considering that evidence for improper character purposes. It is presumed that the jurors followed that instruction.[117]

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[113] 11/13/2014, 160.
[114] 11/20/2014, 106.
[115] MCL 769.26; *People v Snyder* (*After Remand*), 301 Mich App 99, 111 (2013).
[116] *People v Knapp*, 244 Mich App 361, 378 (2001).
[117] See *People v Roscoe*, 303 Mich App 633, 646 (2014) ("[T]he trial court provided a limiting instruction, which can help to alleviate any danger of unfair prejudice, given that jurors are presumed to follow their instructions.").

Thus, even if the sexual misconduct evidence was erroneously admitted, the Defendant is not entitled to reversal – the Defendant failed to carry his burden of demonstrating that the erroneous admission of such evidence more probably than not resulted in a miscarriage of justice. In other words, the Defendant did not establish that he was deprived of a fair trial. Most of what the Court of Appeals found objectionable was not legally improper and anything that was improperly admitted was not so significant that its introduction into evidence worked to convict an otherwise innocent man due to overwhelming evidence of his guilt. The Defendant was properly found guilty. The Defendant's conviction should stand.

III. A witness may point out observations from a surveillance video that are not otherwise obvious to the jury. In this case, police officers pointed out several similarities between the Defendant and the suspect entering the Family Dollar that were not otherwise obvious. Since the testimony did not invade the province of the jury and the jury was repeatedly properly instructed as how to treat the testimony, there was no error.

Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion.[118] An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling.[119] A decision on a close evidentiary question ordinarily cannot be an abuse of discretion.[120]

Discussion

Generally, opinion testimony by a lay witness is permitted if the testimony is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[121] But "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense."[122] Moreover, when "a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury."[123] For example, typically, if a jury is equally capable of identifying the individual

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[118] *People v Watson*, 245 Mich App 572, 575 (2001).
[119] *People v Ullah*, 216 Mich App 669, 673 (1996).
[120] *People v Bahoda*, 448 Mich 261, 289 (1995).
[121] MRE 701.
[122] *People v Fomby*, 300 Mich App 46, 53 (2013) (citation omitted).
[123] *People v Drossart*, 99 Mich App 66, 80 (1980).

shown in a video or photograph, a lay witness who has viewed a video may not identify a defendant as the individual depicted in the video or photograph.[124]

The Court of Appeals erroneously found that three witnesses, Sergeant Thomas Lance, Corporal Benjamin Harless, and Detective James Isaacs, invaded the province of the jury when they testified as to their observations in viewing videotaped evidence. That is not the case. The idea that the identification testimony would be improper evolves from the holding of *People v Fomby*, a case that relies on a federal case from the Ninth Circuit, *United States v Begay*.[125] Courts have simply extrapolated the holding of *People v Fomby* into situations where it need not be applied. As long as a jury is properly instructed, as this jury was,[126] that they make the determination of what the facts of the case are and how much of what a witness says they believe, there should be no impediment to any witness, even a police witness, giving their opinion that they thought the person shown in a videotape matches the description of a defendant if the comments are helpful to understanding the contents of the recorded videotape or their observations would not otherwise be readily apparent to the jury.

Moreover, the fact that the police believe a video recording contains a depiction of the Defendant is implicit in its introduction into evidence. The jury would still know that they are the ones that decide what testimony is true or untrue. The jurors are told to evaluate all the witnesses the same way. It should not be any different when they are being told about a videotape. The jury is free to believe or disbelieve any testimony, even expert testimony, and the defense is free to cross-examine the witness, so it is unclear where a special rule for surveillance video is even necessary. MRE 701 permits lay opinion testimony that is rationally based on the

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[124] See *People v Fomby*, 300 Mich App at 52–53.
[125] *United States v Begay*, 42 F 3d 486 (CA 9, 1994).
[126] 11/10/2014, 180.

perception of the witness and is helpful to a clear understanding to the witness's testimony or the determination of a fact in issue. The rule permits testimony that is based on common sense and does not involve highly specialized knowledge. Here, the opinion that the person depicted on the videotape was the Defendant was based on common sense - it was based on comparing the physical descriptions of the Defendant who was under arrest (including what clothes he regularly wore and the type of shoes he regularly wore) with the physical characteristics of the person in the video. There is nothing improper about this testimony because the jury is well aware that they are still the sole determiners of the facts of the case.

A key piece of evidence in this case was the surveillance video from the Dearborn Family Dollar store recorded on July 15, 2013, the date of the murders. Several people who knew the Defendant, either from working with him or interacting with him on a regular basis, identified the Defendant as being the perpetrator depicted on the Family Dollar surveillance video. This testimony was not objected to. Examining each of the three police witnesses in turn, Sergeant Lance never testified that it was the Defendant in the crime scene video, he just said that he saw a man wearing a dark coat with a hood and wearing jeans leave the store with Brenna Machus.[127] The next day, July 16, 2013, a suspect wearing a dark hooded coat entered the store at 5:18 a.m. and exited the store at 5:21 a.m..[128] Still shots and video of the suspect entering the store and exiting the store with Brenna Machus were released to the media to attempt to identify the suspect.[129] Sergeant Lance further testified that he viewed the prior *six months* of store surveillance video looking for the Defendant or the Defendant's girlfriend, Astrin Chandler,

[127] 11/11/2014, 103.
[128] 11/11/2014, 119.
[129] 11/11/2014, 125.

entering the Dearborn Family Dollar store.[130] To have the jury do the same would be an extremely inefficient use of the jury's and the court's time.[131] Therefore, to have Sergeant Lance testify concerning activity at the store which he believed to be the Defendant during that period of time helped the jury discern correctly and efficiently the events depicted in the surveillance videotape. This cannot constitute error.

Sergeant Lance testified that when he watched the six months of surveillance videos from the Family Dollar and he noticed that on April 15, 2013, April 17, 2013, and May 28, 2013, that a person *who appeared to be Mr. Bryant* entered and exited the store and that the same person can be seen standing at a cash register with Brenna Machus.[132] This was used as a way of determining when the last time the Defendant had been in the store prior to the murders. This was relevant in relation to the Defendant's DNA that was on the black towel found at the crime scene. The Defendant argued that he touched this black towel on a previous trip into the store. The prosecution was able to show that the towels had been restocked on June 19 and July 3, well after the Defendant's last trip into the store on May 28, 2013. Sergeant Lance also gave a description of the layout of the store and where the surveillance cameras were located within the store.[133] The Sergeant's testimony was merely to give the video context as to why the video was relevant and why he preserved that particular video as part of his investigation. This is not an improper purpose.

Dearborn Police Corporal Benjamin Harless testified that after reviewing several surveillance videos multiple times from other businesses in the same general area as the Family

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130 11/11/2014, 126.
131 See *United States v Begay*, 42 F3d 486, 503 (1994).
132 11/11/2014, 128-129.
133 11/11/2014, 112-113.

Dollar (such as the Goodwill store, ACO Hardware, Value Land, Rite Aid, and the Newman Building) he found a surveillance tape from the Holiday Grill showing the Defendant coming in and ordering food on July 18, 2013.[134] Corporal Harless had already been told by other Dearborn police officers that they had observed the Defendant enter the Holiday Grill during their surveillance of his vehicle,[135] and a receipt also gave him a date and time that the Defendant had been at the Holiday Grill.[136] Corporal Harless also testified that the arm motion that the Defendant used to open the door of Holiday Grill was the same motion that the suspect used to open the door of the Family Dollar in the surveillance video of July 15, 2013. Contrary to the Court of Appeals ruling, Corporal Harless did *not* identify the Defendant as being in the Family Dollar surveillance video of the crime scene. He was highlighting something contained in the video rather than substituting his opinion for the jury. Corporal Harless's testimony related to seeing the Defendant on July 18, 2013, three days after the murder, getting food from the Holiday Grill restaurant. He further testified that the suspect in the Family Dollar crime scene video used the same arm motion to open the door as the Defendant did when he entered the Holiday Grill restaurant. This was a helpful observation for the jury. There was no objection to this testimony.[137]

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[134] 11/12/2014, 163.

[135] Corporal Gracer testified that he had found the Defendant's black 2012 Jeep Liberty vehicle was registered to the Defendant and that was the vehicle they were following on July 18, 2014. 11/12/2014, 173. Corporal Gracer also testified the person he identified as the Defendant entered the Holiday Grill, exited, and then re-entered the restaurant a short time later carrying a white plastic bag with two takeout containers in it. 11/12/2014, 175.

[136] 11/12/2014, 152.

[137] The testimony was as follows:

> A. [by Corporal Benjamin Harless] What this video shows is the defendant, Mr. Bryant, coming in. He enters the store, appears to place an order, exits, comes back in, and then picks up his food and exits a second time.

In context, Corporal Harless's testimony regarding what he saw on the surveillance footage was part of his explanation of the comparison between the two videos, and not an improper commentary on the Defendant's guilt or innocence. Because such testimony was helpful to a clear understanding of the exhibits, the testimony was not improper lay opinion testimony according to MRE 701, and the Defendant has not shown plain error affecting his substantial rights. The jury had ample opportunity to view all the videos and assess their contents, and they were in fact told by the court that they could reject a witness's testimony and that police officers should be judged by the same standard as any other witness.[138]

The Court of Appeals also held that it invaded the province of the jury when Corporal James Isaacs testified that he believed that the jacket worn in the Family Dollar surveillance video was the same jacket that appeared in a photograph on the Defendant's computer.[139] The trial testimony was as follows:

> Q. [By Assistant Prosecutor Ms. Hagaman-Clark] : Corporal Isaacs, do you recognize this?
>
> A. [by Corporal James Isaacs] I do.
>
> Q. What is this?
>
> A. This is a photograph that I found on the defendant's computer, underneath the user profile of, Lavere Bryant, in the pictures section under that user profile.

> One observation I made while reviewing is that upon exiting the door, he makes a very discerned motion, of using his arm as he pushes the door open, and again, I noted that it appeared to be very similar in the way that he – that the suspect had opened the door while leaving the Family Dollar, again using his arm in the exact same manner.

11/12/2014, 162-163.

[138] 11/21/2014, 80; 81; 99.

[139] Defendant-appellant's brief on appeal, p. 25.

Q. And were you able to determine when this picture was placed on the computer?

A. It was placed on the computer February 20th of 2013.

Q. Detective Isaacs, have you had an opportunity to review People's Exhibit No. 4, the surveillance video from the Family Dollar?

A. I have.

Q. And based on looking at this exhibit, as well as on Exhibit No. 4, are you able to make a comparison between this jacket, and the jacket that's seen in the video?

A. I believe it to be the same.

Q. Why is that?

A. May I zoom in, to show them exactly –

Q. Yes.

A. The point –

Q. Do whatever you need to do, in terms of your explanation.

THE COURT: Ladies and gentlemen, just so you know, this witness has not been given to you as an expert. Although he's giving you his opinion about what he thinks about this jacket, it's just his opinion, like any other witness, just like the people from Family Dollar, who gave their opinions. And just like Mr. Bryant's brother, and fiancé. So, I just don't want you all to think that because he's – remember my instructions, is that Police Officer testimony is to be taken just as you would any other witness. You all understand that?

You may.

Ms. Hagaman-Clark: Thank you.

Q. (By Ms. Hagaman-Clark): Corporal Isaacs, as you were.

A. Okay. One of the first reasons why I believe it to be the same jacket is because it is a big, thicker, larger jacket, similar to the one that is in the surveillance video. The second reason is, is exactly what I highlighted here, in the photograph, that it looks like it's second zipper for a side pocket, on the

> coat. When you watch the surveillance video, as the suspect enters the store, you can see that same mark on his coat. Okay.
>
> You can't tell that it is a zipper, but it's in the same general location, on the jacket, as is in this picture. Also, when the suspect comes in, on the surveillance video, he has the black hood up. When he leaves, with Brenna, later on in the evening, he has that black hood down, and the brown hood from the sweat shirt is up. So, that's why I feel it's the same jacket.
>
> Q. And now, can we go ahead and play Exhibit No. 4, and can you show us on that what it is that you just told us?
>
> A. Right here, where my pinky finger is, it appears to be that same zipper, on the breast of the jacket. And his hood is up, in this view. As you'll see, as he continues walking to the right, as he enters the door.
>
> In this view, you cannot see the hood laying on the back of the coat, and hood appears to be black, in this view.
>
> In this view, when they're leaving the store, you can now see the hood laying down, and the brown hood is up over the head.[140]

From this testimony it is clear that Detective Issac's testimony was not meant to invade the province of the jury. He was explaining the similarities he found, as one of the officers in charge of the case, who had watched the surveillance video several times, who was very familiar with all the evidence in the case, between the jacket shown on the surveillance video and the jacket worn by the Defendant in a picture on the Defendant's laptop computer found at the Defendant's apartment. The Detective's testimony could help the jury discern correctly and efficiently the jacket depicted in the surveillance videotape. Also, the witness's identification of the jacket was not an expression of the Defendant's guilt or innocence of the charged offense; Detective Isaacs did not testify that the Defendant was guilty of the murders. Since there was a limiting instruction by the court during the testimony, and other instructions during final jury

[140] 11/19/2014, 22.

instructions explained to the jury how to treat this police testimony, there was no error in admitting the testimony that was helpful to the jury, and the Court of Appeals was clearly incorrect in holding otherwise.

RELIEF REQUESTED

THEREFORE, the People request this Honorable Court to (a) peremptorily reverse the decision of the Court of Appeals granting a new trial, or (b) grant the People's application for leave to appeal, or grant other relief as appropriate.

Respectfully submitted,

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Appendix A

Unpublished Court of Appeals Decision

People v Douglas Levere Bryant

COA No. 325569

(August 23, 2016)